I have given careful consideration to the testimonies of Chung Shing Fatt (PW2) and that of Abdul Mohen (DW3) and Abdul Halib (DW4). I prefer the evidence of Chung to that of the defendant's witnesses.

In Federal Court case of *Muniandy & Ors.* v. *Public Prosecutor*[5] H. T. Ong F.J. (as he then was) said that the fact of being unshaken in cross-examination was not *per se* an all-sufficient acid test of credibility; the inherent probability or improbability of a fact in issue must be the prime consideration.

In the year 1971 I take judicial notice that the Chinese New Year fell on the 27th and 28th January, 1971. It is common knowledge that during the Chinese New Year all timber camps in Sabah would be closed down to enable the Chinese workers to return homes to celebrate the festival with the families. It follows that during the Chinese New Year there would probably be insufficient logs to be towed away. Knowing this fact, I find it difficult to believe that the "serang" and his crew would remain at Sungei Sugut from January 17, 1971 until February 7, 1971. I accept Chung's testimony when he testified that after he had returned from the timber camp he found the defendant's boat no longer at the anchorage. Chung assumed and rightly assumed that the boat must have returned to Sandakan because sometime in January 1971 he met the "serang" who informed him that the boat would go to Sungei Sûgut to tow the logs after the Chinese New Year. There was another good reason why the boat had to return to Sandakan. Because it is customary on Chinese New Year's day to give "ang pow" or gift to the workers to show appreciation for work done. Every worker, both native and non-native, looks forward to this with hope and premeditation. The "serang" and his crew are no exception. For these reasons, I hold that the defendant's boat did not wait at Sungei Sugut from January 17, 1971 until February 7, 1971. On the evidence, I am satisfied that the boat sailed for Sungei Sugut on January, 17, 1971 but returned to Sandakan after waiting for a few days. It returned to Sungei Sugut again after the Chinese New Year, when I am unable to decide, on the meagre evidence adduced before me.

Judgment for the plaintiff.

SUCHA SINGH v. SUET CHOW HOUSING DEVELOPMENT SDN. BHD.

[O.C.J. (Mohamed Azmi J.) March 17, 1975]
[Kuala Lumpur — Civil Suit No. 720 of 1974]

Practice and Procedure — Compromise — Enforcement — R.S.C., 1957, O.32 r.6.

As a result of negotiation, the plaintiffs agreed to discontinue the proceedings in this action and the defendants agreed to pay him $6,000. Subsequently the defendants refused to pay the sum of $6,000 and imposed a condition precedent. The plaintiff applied to enter final judgment under O.32 r.6 of the Rules of the Supreme Court.

Held: as the defendants did not have any defence and there was no serious question of law involved, this was a suitable case to be dealt with under O.32 r.6.

MOTION.

Jagjit Singh for the plaintiff.

K. C. Chai for the defendants.

Mohamed Azmi J.: This was an application by Notice of Motion for an order that the plaintiff be at liberty to enter judgment for the sum of $6,000 against the defendants under Order 32 Rule 6 of the Rules of the Supreme Court, 1957.

The plaintiff was the tenant of the defendants of premises known as Nos. 3261, 3262 and 3263, Jalan Genting Kelang, Setapak, Kuala Lumpur, which he had sublet to three tenants. The defendants being desirous of developing the property took steps to obtain vacant possession of the premises, and one of the steps taken was to cause water supply to the said premises to be disconnected. By specially indorsed writ, the plaintiff sued the defendants for damages and for an order that they do restore the water supply. It was pleaded, *inter alia*, that the defendants had unlawfully terminated the tenancy by letter dated April 25, 1973. On June 24, 1974, the plaintiff obtained an interlocutory order of mandamus by Summons-in-Chambers whereby the defendants were ordered to restore the water supply to the three permises and also for interim injunction restraining the defendants from disconnecting the water supply. In the meantime, although the defendants had entered appearance, no Statement of Defence was filed as both parties had entered into negotiation with a view to settlement out of court. As a result of this negotiation, it was not in dispute from the affidavits filed in the present application that they finally agreed that the defendants would pay the plaintiff a sum of $6,000 in full settlement of the civil suit and that the plaintiff would file an application to discontinue the order of mandamus and injunction obtained on June 24. It should be noted that this offer and acceptance were not made without prejudice. The terms of settlement were embodied in a letter dated July 9, 1974 (Exhibit "SS1"). The defendants, however, failed to pay the agreed sum of $6,000 in spite of repeated reminders vide letters dated July 25 ("SS2") and August 8 ("SS3"). On the contrary, on August 12, the defendants' solicitors wrote to the plaintiff's solicitors in the following terms:

"We refer to your letter dated 25.7.74.

Our client have deposited with us the sum of $6,000 and we are instructed not to release the same to you unless your client have completely vacated the premises before 20/8/74.

We have been further instructed that our client's offer is only valid until 20/8/74 and thereafter our client are at liberty to take whatever action they deem fit."

From the affidavit of Choi Mee Chen sworn on March 14, 1975, it was clear that the defendants' defence was based on the above letter. It was their contention that since the plaintiff had failed and neglected to vacate the three premises on or before August 20, 1974, their offer of $6,000 was revoked through lapse of time, and that thereafter the plaintiff's right under the said letter was extinguished.

The principal issue to be decided in this case was whether the plaintiff's right was based on the terms of settlement as contained in the letter dated July 9 (Exhibit "SS1") or on the letter dated August 12 ("SS4"). In my judgment, the plaintiff's right was

based on the July letter, and that the dead-line imposed by the defendants in the letter dated August 12, which merely gave the plaintiff merely eight days' notice to vacate, was arbitrarily and unilaterally imposed.

When the defendants agreed to pay $6,000 in July 1974, it could reasonably be inferred that they knew that the money was to be utilized by the plaintiff for the purpose of compensating the plaintiff and his sub-tenants. In fact, in the letter dated July 25 (Exhibit "SS2"), the defendants were specifically informed that the plaintiff required the money as soon as possible for that purpose. It should also be reasonably inferred that the defendants must have agreed that on the question of compensating the sub-tenants, it should be done only through the plaintiff who, after all, was the lawful tenant of the defendants.

In the event, it is inconceivable why the defendants should withhold the payment of $6,000 as agreed in July. Having failed to honour their promise, and having known the purpose of the money, it was unreasonable for the defendants to impose a new pre-condition whereby the plaintiff should first evict the sub-tenants within eight days of the letter dated August 12. In my opinion, the condition precedent imposed was not binding and unenforceable. How could the plaintiff evict the sub-tenants without the $6,000 being paid first? To my mind, nor were the defendants entitled to deduct the sum of $2,000 from the agreed sum of $6,000. By paragraph 8 of Choi Mee Chen's affidavit, it was alleged that due to plaintiff's default in negotiating a settlement with the sub-tenants they had forced the defendants to pay them a sum of $2,000 as compensation. In the first place, there was no evidence before me that any of the sub-tenants had received any money from the defendants. Even if there was such payment, the evidence merely showed that having failed to pay the plaintiff $6.000 as agreed, the defendants had entered into negotiation with the sub-tenants behind the plaintiff's back. Having done so, they then alleged that the plaintiff had failed or neglected to negotiate a settlement with the sub-tenants. Clearly this could not be a valid defence to the plaintiff's claim. It is my view that, if only the defendants had kept to their bargain and paid the plaintiff $6,000 in July or by August 12, the present dispute would not have arisen.

Under the circumstances, it was my finding that there was no serious question of law involved in this case, and that this was a suitable case to be dealt with under Order 32 Rule 6. Further, all the three sub-tenants and the plaintiff had already vacated the said premises. I accordingly allowed the judgment in terms of the Motion.

Order accordingly.

Solicitors: *Jagjit Singh & Co.; K. C. Chai & Co.*

FARIDAH BINTI MAT AKIR & ANOR. v. SHARIFAH BINTI HAJI AHMAD & ORS.

[O.C.J. (Syed Agil Barakbah J.) March 24, 1975]
[Alor Star — Civil Suit No. 51 of 1969]

Distribution — Small estates — Small Estates (Distribution) Act, 1955, ss. 10(1) and 14 — Setting aside order of collector — Jurisdiction of the court.

The parties herein appeared at a hearing for the distribution of the estate of a deceased under the Small Estates (Distribution) Act 1955 by the Collector. They agreed to the distribution being made in accordance with the Muslim law. The Collector made an order of distribution accordingly. The plaintiffs who appeared as a Committee for one of the widows, Aishah, applied for the order to be set aside on the ground that at the material time Aishah was of unsound mind.

Held: (1) the court has jurisdiction to revoke or set aside the order of a tribunal over whom the court has superior jurisdiction and control particularly so if it is based on fraud;

(2) in this case fraud was not pleaded and on the facts there was a glaring absence of fraud and therefore the application must be dismissed.

Cases referred to:-

(1) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.
(2) *Kinch* v. *Walcott* [1929] A.C. 482
(3) *Preston Banking Company* v. *William Allsup & Sons* [1895] 1 Ch. 141 at p. 143.
(4) *Gordon-Smith* v. *Peizer* 65 S.J. 607.
(5) *Birch* v. *Birch* [1902] P. 130, C.A.
(6) *Au Yuan Chee* v. *Lim Leong Thiam & Ors.* 2 M.C. 260.
(7) *Ex parte Pratt* [1884] 12 Q.B.D. 334.
(8) *Ex parte May* [1884] 12 Q.B.D. 497

CIVIL SUIT.

A. Jayadeva (*Oo Gin Sun* with him) for the plaintiffs.

R. C. Murugeson for first, fourth, fifth, sixth and seventh defendants.

Syed Agil Barakbah J.: This is a claim to set aside a distribution order made by the Collector, Pendang, in the State of Kedah, under the Small Estates (Distribution) Act, 1955.

The agreed facts are as follows:—

The land in dispute belonged to one Akil bin Lebai Mat who died on October 20, 1956. He left two widows one of whom was Aishah binti Man for whom the plaintiffs appear as Committee under Order of Court made on December 1, 1968. The second widow was Sharifah binti Haji Ahmad, the first defendant. The two plaintiffs, the second, third, fourth, seventh and eighth defendants are the natural children of the deceased Akil, the sixth defendant a daughter-in-law and the rest of the defendants are the lawful beneficiaries to his estates. Upon his death a distribution suit was applied by the third defendant. During the hearing before the Collector, Pendang, the applicant and all the other beneficiaries, including the first widow Aishah, were present. According to record (pages 1 to 4 of Agreed Bundle, Exhibit "B") all present agreed to the distribution being made in accordance with the Muslim law. An order was accordingly made by the Collector under section 13 of the Act. (See pages 8 and 9 of Agreed Bundle, Exhibit "A"). Aishah was entitled to 448/2048 shares as a widow and so was the second widow, Itam. It